

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

EBBE STORM and EBBE STORM
SCIENTIFIC ENTERPRISES, INC.
(a/k/a ESSE, Inc.),

Plaintiff,

vs.

RONALD VAN BEEK; FANDSCO,
INC.; FANDSCO ENTERPRISES,
INC.; VAN BEEK SCIENTIFIC,
L.L.C.; VAN BEEK NUTRITIONAL,
INC.; VAN BEEK GLOBAL/NINKOV,
L.L.C.; their successors and alter egos,

Defendants.

No. C 04-4022-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING
DEFENDANTS' MOTION TO
DISMISS AND MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

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Faced with a motion to dismiss for lack of diversity jurisdiction, the plaintiffs filed an amended complaint omitting several of the partnership defendants named in the original complaint. However, the remaining defendants have renewed their attack on the amended complaint, asserting that one of the omitted partnerships is an “indispensable” party, but its presence would again destroy diversity jurisdiction. Thus, the court must decide if the partnership is an “indispensable” party, and if that partnership must be joined, whether or not the court can exercise subject matter jurisdiction over the plaintiffs’ claims. The court must also consider the defendants’ alternative ground for dismissing two of the counts of the amended complaint, which is failure of those counts to state claims upon which relief can be granted.

I. INTRODUCTION

A. Factual Background

The following statement of the factual background to this litigation is drawn from the plaintiffs' Amended Complaint, filed on April 23, 2004 (docket no. 4). Plaintiffs Ebbe Storm and ESSE, Inc., allege that, in 1991, Storm and defendant Ronald Van Beek formed two partnerships, Fandsco Scientific and Fandsco Germany & Pharmaceutical, via a written partnership agreement. However, in 1994, those two partnerships were merged into a new partnership called Van Beek Scientific, Ltd. (VBS), to carry on the same business as the prior partnerships, which apparently involved animal nutrition and feed products. Storm entrusted the daily operations of VBS to Ronald Van Beek. In 1996, VBS was appointed as the distributor for an exclusive line of products imported by ESSE from Europe. VBS was allowed to sell those products to Van Beek Global/Ninkov, L.L.C. (Global), which was an existing customer of ESSE, as well as to other customers. Although VBS initially paid its account with ESSE for products shipped to VBS, VBS eventually fell into arrears in excess of \$300,000.

Storm and ESSE also allege that Ronald Van Beek conducted the business of another company, Fandsco, Inc., which had no employees, using the employees of VBS, but Fandsco, Inc., did not compensate VBS for use of its employees. Also, Ronald Van Beek owned the real estate and buildings from which VBS operated and charged VBS rent for use of those properties. Ronald Van Beek and Fandsco, Inc., also charged VBS for handling and other services. Although Storm periodically requested accountings of the operations of VBS, including the amounts charged to VBS by Ronald Van Beek and Fandsco, Inc., Storm never received such an accounting.

The relationship between Ronald Van Beek and Storm apparently soured further, until the fall of 1999, when Storm alleges that Ronald Van Beek declared their partnership

at an end. Thereafter, Storm alleges that Ronald Van Beek continued the business of VBS himself. Storm alleges that, despite frequent requests, Ronald Van Beek has never accounted for the partnership profits of VBS or repaid Storm's capital account, although Ronald Van Beek did offer Storm \$75,000 at one point to settle accounts. Storm rejected that offer as inadequate. Despite the disputes between Storm and Ronald Van Beek, Ronald Van Beek continued to transact business with ESSE into 2000, at which point Ronald Van Beek severed the distribution agreement with ESSE, leaving an outstanding account of \$311,991.04 unpaid.

B. Procedural Background

Plaintiffs Ebbe Storm and ESSE, Inc., filed the original Complaint in this matter on March 26, 2004, against defendants Ronald Van Beek; Van Beek Scientific, Ltd. (VBS); Fandsco, Inc.; Van Beek Scientific, L.L.C.; Fandsco Scientific; Fandsco Germany & Pharmaceutical; Van Beek Nutritional, Inc.; Van Beek Global/Ninkov, L.L.C.; and their successors and alter egos. *See* Complaint (docket no. 2). Jurisdiction of this court was premised on diversity of citizenship. However, on April 8, 2004, the defendants moved to dismiss the original Complaint pursuant to Rules 12(b)(1) and 12(h)(3) of the Federal Rules of Civil Procedure for lack of diversity, because a general partnership's citizenship is the same as the citizenship of all of its partners, and plaintiff Ebbe Storm is a partner in VBS, Fandsco Scientific, and Fandsco Germany & Pharmaceutical. *See* Defendants' Motion To Dismiss (docket no. 3). In response, Storm and ESSE first filed an Amended Complaint, which omitted the partnership defendants, *see* Amended Complaint (docket no. 4), then resisted the defendants' first motion to dismiss on the ground that the motion was moot. *See* Brief In Resistance To Defendants' Motion To Dismiss (docket no. 5).

In their Amended Complaint, Storm and Esse allege, generally, that VBS breached contracts with ESSE by failing to pay for goods delivered by ESSE to VBS; that one or more of the defendants named in the amended complaint are successors to VBS, such that they are liable for the wrongdoing of VBS; and that the defendants have usurped the business relationships and opportunities of VBS, Storm, and ESSE. More specifically, in Count I (“Account”), ESSE seeks judgment from Ronald Van Beek and Fandsco, Inc., and their successors and alter egos, in the amount of the unpaid account of \$311,991.04, plus interest and costs. In Count II (“Goods Sold And Delivered”), ESSE seeks judgment from Ronald Van Beek and Fandsco, Inc., and their successors and alter egos, in the same amount for goods sold and delivered. In Count III (“Partnership Accounting”), Storm seeks a partnership accounting of VBS from Ronald Van Beek and Fandsco, Inc., and their successors and alter egos, pursuant to IOWA CODE §§ 486A.401 and 486A.403. In Count IV (“Breach Of Duty Of Good Faith And Fair Dealing”), Storm alleges breach of the duty of good faith and fair dealing in the VBS partnership by Ronald Van Beek and Fandsco, Inc. In Count V (“Fraud”), Storm alleges fraud by Fandsco, Inc., Fandsco Enterprises, Inc., and Ronald Van Beek. In Count VI (“Intentional Interference With Business Relations”), Storm and ESSE allege intentional interference by Ronald Van Beek with a prospective business relationship of Storm and ESSE with Dr. Ninkov. In the next count, also designated Count VI (“Breach Of Partnership Agreement”), Storm alleges breach of a partnership agreement by Ronald Van Beek. In Count VII (“Breach Of Distribution Agreement”), ESSE alleges that VBS, Fandsco, Inc., and Ronald Van Beek breached a distribution agreement with ESSE. Finally, in Count VIII (“Negligence As To Property”), ESSE alleges that Fandsco, Inc., and Ronald Van Beek breached a duty to use commercially reasonable care to safeguard products and reusable freight containers shipped by ESSE to VBS, Fandsco, Inc., and Ronald Van Beek.

On May 6, 2004, the defendants moved to dismiss the Amended Complaint, pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure, for failure to join an indispensable party, VBS. *See* Defendants’ Motion To Dismiss (docket no. 8). In the alternative, the defendants moved to dismiss Counts I and II of the Amended Complaint, pursuant to Rule 12(b)(6), for failure to state claims upon which relief can be granted, where Storm and ESSE have failed to seek relief against the VBS partnership for breach of contract before seeking relief against individual partners. Storm and ESSE resisted the defendants’ renewed motion to dismiss the Amended Complaint on May 21, 2004. *See* Brief In Resistance To Defendants’ Motion To Dismiss (docket no. 9). The defendants’ motions to dismiss are now fully submitted.

II. LEGAL ANALYSIS

A. The Motion To Dismiss The Original Complaint

The court finds that the defendants’ motion to dismiss the original Complaint in this matter is moot, owing to the plaintiffs’ filing of an Amended Complaint. Rule 15(a) of the Federal Rules of Civil Procedure provides, in pertinent part, that “[a] party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served.” FED. R. CIV. P. 15(a). Although the Eighth Circuit Court of Appeals has not spoken on the matter, this court, like several Circuit Courts of Appeals—both earlier and later—has held that a motion to dismiss is not a “responsive pleading” within the meaning of Rule 15(a), so that it does not cut off a party’s right to amend its complaint. *Lockhart v. Cedar Rapids Comm. Sch. Dist.*, 963 F. Supp. 805, 810 (N.D. Iowa 1997) (citing *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1530 (9th Cir. 1995); *McCrory v. Poythress*, 638 F.2d 1308, 1314 (5th Cir.), *cert. denied*, 454 U.S. 865 (1981); and *McDonald v. Hall*, 579 F.2d 120 (1st Cir. 1978)); *accord, e.g., Youn v. Track, Inc.*, 324 F.3d 409, 416 n.6

(6th Cir. 2003) (the trial court incorrectly struck an amended complaint, because a motion to dismiss is not a “responsive pleading” within the meaning of Rule 15(a)); *McKinney v. Irving Indep. Sch. Dist.*, 309 F.3d 308, 315 (4th Cir. 2002) (“Because a Rule 12(b)(6) motion to dismiss is not a ‘responsive pleading,’ the filing of such a motion does not extinguish a party’s right to amend as a matter of course.”); *James v. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 282 (D.C. Cir. 2000) (“We have repeatedly clarified that a motion to dismiss is not a responsive pleading for the purposes of Rule 15.”); *Leonard v. Parry* 219 F.3d 25, 30 (1st Cir. 2000) (the district court lacked discretion to deny a plaintiff’s proposed amendment, despite the filing of a motion to dismiss, because a motion to dismiss does not qualify as a “responsive pleading” within the meaning of Rule 15(a)); *Duda v. Board of Educ. of Franklin Park Pub. Sch. Dist.*, 133 F.3d 1054, 1046-57 (7th Cir. 1998) (“A responsive pleading [within the meaning of Rule 15(a)] does not include a motion to dismiss.”). Consequently, the plaintiffs’ Amended Complaint was an amendment “as a matter of course” that superseded the original Complaint. *See* FED. R. CIV. P. 15(a) (a party may amend “as a matter of course” before a responsive pleading is served). Thus, the defendants’ motion to dismiss the original Complaint will be denied as moot.

B. The Motion To Dismiss The Amended Complaint

The defendants’ motion to dismiss the Amended Complaint requires considerably more analysis than the now moot motion to dismiss the original Complaint. Therefore, the court will begin this part of its analysis with a synopsis of the parties’ arguments, then turn to the standards applicable to the defendants’ motion to dismiss the Amended Complaint, and finally apply those standards to the Amended Complaint in this case.

1. Arguments of the parties

The defendants first moved to dismiss the plaintiffs' Amended Complaint, in its entirety, pursuant to Rule 12(b)(7), for failure to join an indispensable party. In the alternative, the defendants moved to dismiss Counts I and II of the Amended Complaint, pursuant to Rule 12(b)(6), for failure to state claims upon which relief can be granted. As to their first ground for dismissal, the defendants argue that the partners of VBS are all jointly liable, not jointly and severally liable, for any breach of contract by VBS. Therefore, they contend, VBS and all of its partners must be joined as defendants in this case, if feasible, pursuant to Rule 19(a). However, the defendants point out that indispensable partners, VBS and Storm, have not been joined as required, and joining those parties would destroy diversity, warranting dismissal of the action in its entirety. Similarly, in support of their alternative ground for dismissal of Counts I and II, the defendants assert that, under Iowa partnership law, relief for a breach of contract by a partnership must be sought against the partnership before the assets of the individual partners can be sought. However, they point out that Counts I and II overlook that requirement, because those counts are brought against only some of the named partners, and as such, fail to state claims upon which relief can be granted.

The plaintiffs respond that IOWA CODE § 486.41(6) provides that, where a partner dissolves the partnership, but then carries on the business formerly conducted by the partnership without liquidating the partnership affairs, creditors of the partnership become creditors of the partner continuing the business. They point out that, in paragraphs 28 through 30 of their Amended Complaint, they allege that Ronald Van Beek unilaterally dissolved the VBS partnership, then continued the business formerly conducted by VBS without liquidating the affairs of VBS. Thus, they contend that it is proper for them to sue Ronald Van Beek directly. They argue, further, that the former members of the VBS

partnership are already parties to this action, so that all necessary relief can be granted. For example, they contend that Ronald Van Beek can assert counterclaims and offsets against Storm. They also point out that VBS, a supposedly indispensable party, is not claiming anything, since it no longer exists. Thus, they contend that complete relief can be granted with existing parties and that Ronald Van Beek will not be prejudiced by the absence of any party.

2. *Applicable standards*

a. *Dismissal pursuant to Rule 12(b)(7)*

The defendants have first moved to dismiss the Amended Complaint, in its entirety, pursuant to Rule 12(b)(7) for failure to join an indispensable party. Pursuant to Rule 12(b)(7), a party may move to dismiss a complaint for “failure to join a party under Rule 19.” FED. R. CIV. P. 12(b)(7). Rule 19, in turn, provides, in pertinent part, as follows:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person’s absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may (i) as a practical matter impair or impede the person’s ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19(a) & (b).

As this court explained some years ago, the process for disposition of a motion to dismiss pursuant to Rule 12(b)(7) involves a two-step process. First, the court must determine whether the absent party satisfies the threshold requirements of Rule 19(a), and if it does, the court must then determine whether to dismiss the action if that party cannot feasibly be joined by weighing the four additional factors specified in Rule 19(b). *See DeWit v. Firststar Corp.*, 879 F. Supp. 947, 991 (N.D. Iowa 1994) (citing *Boulevard Bank Nat'l Ass'n v. Philips Med. Sys. Int'l*, 15 F.3d 1419, 1422-23 (7th Cir. 1994)). At the first step in the process, the Seventh Circuit Court of Appeals has read the requirement under Rule 19(a) that “[a] person . . . whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party,” *see* FED. R. CIV. P. 19(a), to mean that “a person should *not* be joined as a party if that joinder would deprive the court of jurisdiction where . . . complete relief otherwise could be accorded among those already parties.” *Culbertson v. Libco Corp.*, 983 F.2d 82, 85 (7th Cir. 1993) (emphasis

added). Moreover, at the first step in the process, where joinder is sought pursuant to Rule 19(a)(1), the proponent of a motion to dismiss under Rule 12(b)(7) must show that “in the person’s absence complete relief cannot be accorded among those already parties.” FED. R. CIV. P. 19(a)(1). Where joinder is sought pursuant to Rule 19(a)(2), “[t]he proponent of a motion to dismiss under FED. R. CIV. P. 12(b)(7) has the burden of producing evidence showing the nature of the interest possessed by an absent party and that the protection of that interest will be impaired by the absence.” *Id.* at 992. As to the second step in the process, the Eighth Circuit Court of Appeals has explained,

Rule 19(b) authorizes a district court to exercise its equitable powers to dismiss an action if a party regarded as “indispensable” cannot be joined. “Whether a person is ‘indispensable,’ that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation.” *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968). We therefore review a district court’s decision to dismiss an action for failure to join an indispensable party under the highly deferential abuse-of-discretion standard. *United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249, 1251 (8th Cir. 1998).

Spirit Lake Tribe v. North Dakota, 262 F.3d 732, 746 (8th Cir. 2001).

b. Dismissal pursuant to Rule 12(b)(6)

In the alternative, the defendants seek dismissal of Counts I and II pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The issue on a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is not whether a plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence in support of his, her, or its claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1376 (8th Cir. 1989).

In considering a motion to dismiss under Rule 12(b)(6), the court must assume that all facts alleged by the complaining party, here Storm and ESSE, are true, and must liberally construe those allegations. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Gross v. Weber*, 186 F.3d 1089, 1090 (8th Cir. 1999) (“On a motion to dismiss, we review the district court’s decision de novo, accepting all the factual allegations of the complaint as true and construing them in the light most favorable to [the non-movant].”); *St. Croix Waterway Ass’n v. Meyer*, 178 F.3d 515, 519 (8th Cir. 1999) (“We take the well-pleaded allegations in the complaint as true and view the complaint, and all reasonable inferences arising therefrom, in the light most favorable to the plaintiff.”); *Gordon v. Hansen*, 168 F.3d 1109, 1113 (8th Cir. 1999) (same); *Midwestern Machinery, Inc. v. Northwest Airlines*, 167 F.3d 439, 441 (8th Cir. 1999) (same); *Wisdom v. First Midwest Bank*, 167 F.3d 402, 405 (8th Cir. 1999) (same); *Duffy v. Landberg*, 133 F.3d 1120, 1122 (8th Cir.) (same), *cert. denied*, 525 U.S. 821 (1998); *Doe v. Norwest Bank Minn., N.A.*, 107 F.3d 1297, 1303-04 (8th Cir. 1997) (same); *WMX Techs., Inc. v. Gasconade County, Mo.*, 105 F.3d 1195, 1198 (8th Cir. 1997) (same); *First Commercial Trust v. Colt’s Mfg. Co.*, 77 F.3d 1081, 1083 (8th Cir. 1996) (same).

On a motion to dismiss pursuant to Rule 12(b)(6), the court ordinarily cannot consider matters outside of the pleadings, unless the court converts the Rule 12(b)(6) motion into a motion for summary judgment pursuant to Rule 56. *See* FED. R. CIV. P. 12(b)(6); *see also Buck v. F.D.I.C.*, 75 F.3d 1285, 1288 & n. 3 (8th Cir. 1996). However, on a motion to dismiss, the court may consider certain matters outside of the pleadings without converting the motion into a motion for summary judgment, for example, where “the plaintiffs’ claims are based solely on the interpretation of the documents [submitted] and the parties do not dispute the actual contents of the documents.”

Jenisio v. Ozark Airlines, Inc., Retirement Plan, 187 F.3d 970, 972 n. 3 (8th Cir. 1999) (citing *Silver v. H & R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997)).

The court is mindful that in treating the factual allegations of a complaint as true pursuant to Rule 12(b)(6), the court must “reject conclusory allegations of law and unwarranted inferences.” *Silver*, 105 F.3d at 397 (citing *In re Syntex Corp. Securities Lit.*, 95 F.3d 922, 926 (9th Cir. 1996)); *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990) (the court “do[es] not, however, blindly accept the legal conclusions drawn by the pleader from the facts,” citing *Morgan v. Church’s Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987), and 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 595-97 (1969)); *see also LRL Properties v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1103 (6th Cir. 1995) (the court “need not accept as true legal conclusions or unwarranted factual inferences,” quoting *Morgan*, 829 F.2d at 12). Conclusory allegations need not and will not be taken as true; rather, the court will consider whether the *facts* alleged in the plaintiffs’ complaint, accepted as true, are sufficient to state a claim upon which relief can be granted. *Silver*, 105 F.3d at 397; *Westcott*, 901 F.2d at 1488.

The United States Supreme Court and the Eighth Circuit Court of Appeals have both observed that “a court should grant the motion and dismiss the action ‘only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.’” *Handeen v. Lemaire*, 112 F.3d 1339, 1347 (8th Cir. 1997) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)); *accord Conley*, 355 U.S. at 45-46 (“A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief.”); *Meyer*, 178 F.3d at 519 (“The question before the district court, and this court on appeal, is whether the plaintiff can prove any set of facts which would entitle the plaintiff to relief” and “[t]he complaint should be dismissed ‘only

if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations,’” quoting *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995)); *Gordon*, 168 F.3d at 1113 (“We will not dismiss a complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would demonstrate an entitlement to relief.”); *Midwestern Machinery, Inc.*, 167 F.3d at 441 (same); *Springdale Educ. Ass’n v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir. 1998) (same); *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546 (8th Cir. 1997) (same); *Doe*, 107 F.3d at 1304 (same); *WMX Techs., Inc.*, 105 F.3d at 1198 (same). Rule 12(b)(6) does not countenance dismissals based on a judge’s disbelief of a complaint’s factual allegations. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Thus, “[a] motion to dismiss should be granted as a practical matter only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Frey*, 44 F.3d at 671 (internal quotation marks and ellipses omitted); *accord Parnes*, 122 F.3d at 546 (also considering whether there is an “insuperable bar to relief” on the claim).

3. Application of the standards

a. The threshold issue

The issue on the defendants’ motion to dismiss, under either Rule 12(b)(7) or Rule 12(b)(6), boils down to whether the plaintiffs can pursue their claims without also suing VBS. That issue is resolved by reference to Iowa partnership law, as it existed at the time of pertinent events. Specifically, IOWA CODE § 486.41, which was repealed effective January 1, 2001, provided in pertinent part that, “[w]hen a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.” IOWA CODE § 486.41(6). The plain

meaning of this provision is that, in the circumstances identified, a creditor's claim against the partnership may properly be brought against the partner or partners continuing the business of the partnership *without suing the partnership*. As applied here, where the plaintiffs have alleged that Storm was expelled from the VBS partnership, but the remaining partner, Ronald Van Beek, continued the business of the VBS partnership without liquidation of VBS's partnership affairs, *see* Amended Complaint, ¶¶ 28-30, Storm and ESSE, as creditors of VBS, may bring claims against Ronald Van Beek *without suing VBS*.

b. Dismissal pursuant to Rule 12(b)(7)

The resolution of the threshold issue then points the way to resolution of the remaining issues of whether this action should be dismissed in its entirety pursuant to Rule 12(b)(7) for failure to join VBS as an indispensable party or pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted, where the plaintiffs have failed to sue VBS before suing the partners of VBS. First, as to dismissal pursuant to Rule 12(b)(7), where Storm and ESSE have alleged that Storm was expelled from the VBS partnership, but the remaining partner, Ronald Van Beek, continued the business of the VBS partnership without liquidation of VBS's partnership affairs, *see* Amended Complaint, ¶¶ 28-30, it is plain that VBS is not, itself, an "indispensable party." Under the circumstances alleged by Storm and ESSE, VBS is *not* a person in whose absence "complete relief cannot be accorded among those already parties," *see* FED. R. CIV. P. 19(a)(1), because Storm and ESSE may properly sue only the partner of VBS who continued the business of VBS, that is, Ronald Van Beek, in the absence of VBS. Furthermore, because joinder of VBS would "deprive the court of jurisdiction over the subject matter of the action," that is, diversity jurisdiction, and "complete relief otherwise could be accorded among those already parties," VBS "should *not* be joined as a party."

Culbertson, 983 F.2d at 85. In this case, all of the former partners of VBS are parties to the present litigation.

The defendants have made no attempt to carry their alternative burden, under Rule 19(a)(2), to show that VBS has some “interest relating to the subject of this action” or that VBS is “so situated that the disposition of the action in [VBS’s] absence may (i) as a practical matter impair or impede [VBS’s] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [VBS’s] claimed interest.” *See* FED. R. CIV. P. 19(a)(2); *DeWit*, 879 F. Supp. at 991 (the party moving to dismiss bears the burden of making this showing). Thus, the defendants have failed to demonstrate, at the first step in the analysis of a Rule 12(b)(7) motion, that the requirements of Rule 19(a) apply to joinder of VBS.

Similarly, at the second step of the analysis of whether to dismiss pursuant to Rule 12(b)(7) for failure to join a party, assuming that VBS had somehow satisfied the requirements of Rule 19(a), the court finds no basis for exercising its equitable powers to dismiss the action in the circumstances of this case, because VBS is *not* an “indispensable” party. *See* FED. R. CIV. P. 19(b) (requiring the court to consider whether “in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable”); *DeWit*, 879 F. Supp. at 991 (identifying the two-step analysis of a Rule 12(b)(7) motion to dismiss); *Spirit Lake Tribe*, 262 F. Supp. 2d at 746 (noting the court’s equitable authority at this point in the analysis and that whether a person is “indispensable” can only be determined in the context of particular litigation). Here, there is no “prejudice” to the remaining defendants, where the plaintiffs can properly sue Ronald Van Beek as a party who continued the business of the defunct partnership, and all of the former partners of VBS are present; there is no

prejudice to avoid or lessen; and any judgment rendered in the absence of VBS will be adequate. *See* FED. R. CIV. P. 19(b) (first three factors to be considered when joinder is not feasible). Thus, whether or not the plaintiffs will have an adequate remedy if this action is dismissed for nonjoinder of VBS is of little moment. *Id.* (fourth factor).

In short, joinder of VBS is not required by Rule 19, so dismissal pursuant to Rule 12(b)(7) for failure to join VBS is not appropriate.

c. Dismissal pursuant to Rule 12(b)(6)

Dismissal of Counts I and II is likewise not required on the defendants' alternative ground that these counts fail to state claims upon which relief can be granted. Because the court must assume, on a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, that all facts alleged by the plaintiffs are true, and must liberally construe those allegations, the plaintiffs' allegations that Storm was expelled from the VBS partnership, but the remaining partner, Ronald Van Beek, continued the business of the VBS partnership without liquidation of VBS's partnership affairs, *see* Amended Complaint, ¶¶ 28-30, must be taken as true. Furthermore, because the court reads IOWA CODE § 486.41(6) to permit the plaintiffs in such circumstances to sue the remaining partner, Ronald Van Beek, without suing VBS first, this is not a case in which “‘it is clear that no relief could be granted [on Counts I and II] under any set of facts that could be proved consistent with the allegations.’” *Handeen*, 112 F.3d at 1347 (quoting *Hishon*, 467 U.S. at 73); *accord Conley*, 355 F.3d at 45-46. The defendants' supposed “insuperable bar” to relief on Counts I and II, *see Frey*, 44 F.3d at 671 (the face of a complaint must show some “insuperable bar to relief” to justify dismissal pursuant to Rule 12(b)(6)), thus does not exist, and those counts instead *do* state claims upon which relief can be granted.

III. CONCLUSION

The defendants' motion to dismiss the original Complaint in this matter is moot in light of the plaintiffs' filing of a pre-answer Amended Complaint. Moreover, where the Amended Complaint alleges that Ronald Van Beek expelled Storm from VBS, the partnership absent from this litigation, Iowa law permits the plaintiffs to sue Ronald Van Beek individually for breach-of-contract claims against the erstwhile partnership. Consequently, there is no basis in this case to dismiss the Amended Complaint, pursuant to Rule 12(b)(7), for failure to join an indispensable part, or to dismiss Counts I and II pursuant to Rule 12(b)(6) for failure to state claims upon which relief can be granted.

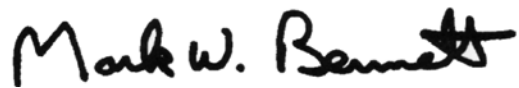
THEREFORE,

1. The defendants' April 8, 2004, Motion To Dismiss For Lack Of Diversity (docket no. 3) is **denied as moot**.

2. The defendants' May 6, 2004, Motion To Dismiss For Failure To Name Indispensable Party Or In The Alternative Motion To Dismiss Counts I And II For Failure To State A Claim (docket no. 8) is **denied in its entirety**.

IT IS SO ORDERED.

DATED this 2nd day of September, 2004.



MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA